

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 06-10206-RWZ

UNITED STATES OF AMERICA

v.

DAVID MALGERI

ORDER ON PRETRIAL MOTION

May 7, 2007

ZOBEL, D.J.

I. Introduction

Defendant David Malgeri (“Malgeri”) has been indicted on one count of bank robbery and, in the commission of the robbery, assaulting and putting in jeopardy the lives of others by using a dangerous weapon that appeared to be a firearm in violation of 18 U.S.C. § 2113(a) and (d). Defendant was arraigned before a magistrate judge. The government moved to detain him, and the magistrate judge, after an evidentiary hearing, entered an order of detention.¹ (Docket # 7.) Defendant then moved for

¹ In granting the evidentiary hearing, Magistrate Judge Bowler concluded that defendant had committed a crime of violence under 18 U.S.C. § 3142(f)(1)(A). In entering the order of detention, she stated that: (1) the defendant had previously been convicted of using a firearm during a crime of violence that bore a “striking resemblance to the [crime charged],” and (2) “[t]he facts suggest that the defendant has a proclivity for violence, despite the fact that he has strong ties to the community including family members and steady employment.” (Docket # 7, Mem. and Order on Govt’s Mot. for Detention at 19-20.)

release (Docket # 12), which the magistrate judge denied.² (Electronic Order, Jan. 23, 2007.) Defendant now moves for de novo review of the magistrate judge's denial of his motion for release. (Docket # 16.) For the reasons discussed below, defendant's motion is denied.

II. Discussion

A. Standard of Review

In the first instance, the parties disagree about the applicable standard of review. Defendant argues that, pursuant to 28 U.S.C. § 636, review of the magistrate judge's determination is de novo. The government, based on recently amended Rule 59, Fed. R. Civ. P., contends that the determination by the magistrate judge may be reversed only if clearly erroneous or contrary to law.

Because I conclude that defendant is not entitled to release under either standard of review, I do not decide the question.

B. Bail Reform Act Factors

Insofar as relevant, the Bail Reform Act, 18 U.S.C. §§ 3141 et seq., expressly authorizes the pretrial detention of a defendant upon a judicial finding that "no condition

² Magistrate Judge Bowler denied the motion because:

[] this court does not find any significant change in circumstances from the time the detention order (Docket Entry # 7) was issued on August 2, 2006. Defense counsel argues that the posting of the defendant's mother's property will secure the defendant's presence as required. However, this court did not find the defendant to be a risk of flight. This court found the defendant to pose a risk of danger to the community, based on the violent nature of the crime with which he [was] charged.

(Electronic Order dated Jan. 23, 2007).

or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.” 18 U.S.C. § 3142(e).

The magistrate judge did not find defendant to be a risk of flight and neither party raises this issue now. She did determine that “no condition or combination of conditions will reasonably assure . . . the safety of any other person and the community.”

The Bail Reform Act sets forth a series of factors the court must consider in deciding whether the safety of the community can be assured. Under section 3142(g), the court must consider:

- (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

- (2) the weight of the evidence against the person;

- (3) the history and characteristics of the person, including –

- (A) the person’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

- (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

- (4) the nature and seriousness of the danger to any person or the community that would be posed by the person’s release

18 U.S.C. § 3142 (g). Moreover, the government must establish danger to others or the

community under section 3142(g)(4) by clear and convincing evidence. See 18 U.S.C. § 3142(f); United States v. Ferranti, 66 F.3d 540, 542 (2d Cir. 1995).

Here, the defendant argues that the following factors militate in favor of his release: his reliable work history as a union mover, the fact that his parents are willing to post \$200,000 in equity as security for his appearance, that he lives in his parents' home, and that he has two teenaged children and is an involved father. (Docket # 16, Def.'s Mot. for De Novo Review of Magistrate Judge's Denial of Mot. for Bail at 4-5.) Defendant also contends that he was not able to bring to the court's attention the fact that the hat and gloves he allegedly wore during the robbery contained not only his DNA, but also that of at least one other person. In light of this evidence, defendant argues that the DNA evidence is weaker than the magistrate was led to believe. (Id. at 2-3.)

Defendant is charged with bank robbery and, in the commission of the robbery, assaulting and putting in jeopardy the lives of others by using a dangerous weapon that "appeared to be a firearm," in violation of 18 U.S.C. § 2113(a) and (d). The charged offense is a crime of violence under 18 U.S.C. § 3142(g) as that term is defined in the Bail Reform Act, 18 U.S.C. § 3156(a)(4).³

³ That statute provides, in pertinent part, that an offense is a "crime of violence" where it is:

- (A) an offense that has as an element of the offense the use, or attempted use, or threatened use of physical force against the person or property of another, or
- (B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense

After examining the 18 U.S.C. § 3142 (g) factors, I conclude that bail should not be granted here. First, the crime alleged – armed bank robbery – is a crime of violence. Second, if the DNA evidence is not conclusive, the evidence is not so weak as to compel defendant's release. Moreover, the fact that defendant has had a reliable work history and strong family support do not rebut the presumption that he is a danger to the community. Defendant pled guilty to committing a similar offense – attempted armed bank robbery – in 1992, for which he served 93 months. While he has not committed any offense during the year between his investigation and his arrest, the nature and seriousness of the charged offense carried out here and its strong similarity to the 1992 conviction weighs against his release.

III. Conclusion

Accordingly, defendant's Motion for De Novo Review of Magistrate Judge's Denial of Motion for Bail (Docket # 16) is DENIED.

May 7, 2007
DATE

/s/Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

18 U.S.C. § 3156(a)(4). The conduct charged satisfies § 3156(a)(4)(B).